91-1608

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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October 1991 Term

SAVE BARTON CREEK ASSOCIATION, INC., WE CARE AUSTIN, INC., and AUSTIN CROSSROADS, INC.,

Petitioners

V.

FEDERAL HIGHWAY ADMINISTRATION (FHWA), TEXAS DEPARTMENT OF TRANSPORTATION, and MOPAC SOUTH TRANSPORTATION CORPORATION,

Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION

for Writ of Certiorari

David O. Frederick,
Counsel of Record for Petitioners
The Law Office of David Frederick
2103 Rio Grande
Austin, Texas 78705
(512) 478 - 1968
(512) 479 - 8269 [facsimile]

Questions presented for review

(1) The Fifth Circuit Court of Appeals in this case did not declare clearly erroneous the district court's "ultimate" fact findings the Austin Outer Loop is a proposal for major federal action, but it nonetheless found to the contrary and, then, rendered judgment. May an appellate court do this, consistently with Rule 52(a) and consistently with this Court's teachings in Pullman-Standard v. Swint, Anderson v. City of Bessemer City, and Icicle Seafoods v. Worthington?

(2) A Federal Highway Administration regulation promulgated pursuant to the National Environmental Policy Act (NEPA) prohibits prospective applicants for federal funding of a proposed project from proceeding to develop with private funds an integral part of the project prior to completion of the NEPA process. May a district court enforce this prohibition in the absence of significant historical federal control of the project?

(3) If the distinction, for purposes of invoking NEPA safeguards, between projects that are "proposed" and those that are merely "contemplated" is guided by the application of a legal standard, what is that legal standard?

Notation of corporate status: No Petitioner is a subsidiary or parent of another corporation.

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Reference to district court and appellate court opinions

The district court opinion in this case is an unreported memorandum opinion from the Western District of Texas, Austin Division. It was entered March 6, 1990 and was amended April 5, 1990. It is reproduced at pages 35 through 68 of the Appendix to this Petition.

The appellate court opinion is from the Fifth Circuit Court of Appeals and is reported at 950 F.2d 1129 (5th Cir. 1992). It is reproduced at pages 1 through 33 of the Appendix to this Petition.

Concise statement of the jurisdictional grounds

The judgment sought to be reviewed is the Fifth Circuit's judgment entered on January 17, 1992, contemporaneously with the opinion referenced above. Both panel and *en banc* rehearing were denied February 24, 1992; the order of denial is reproduced at pages 69 and 70 of the Appendix to this Petition. Jurisdiction in this Court is pursuant to 28 U.S.C. § 1254(1).

Statutory and regulatory provisions germane to this case

1. Rule 52(a), Fed. R. Civ. Proc. (1991)

RULE 52. Findings by the court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

(b) Amendment. * * *

2. 23 C.F.R. § 771.113 (1991) [The Federal Highway Administration's interpretation of this regulation is reproduced at pages 71 through 77 of the Appendix to this Petition.]

§ 771.113 Timing of Administration activities.

(a) The Administration in cooperation with the applicant will perform the work necessary to complete a FONSI or an EIS and comply with other related environmental laws and regulations to the maximum extent possible during the NEPA process. This work includes environmental studies, related engineering studies, agency coordination and public involvement. However, final design activities, property acquisition (with the exception of hardship and protective buying as defined in § 771.117(d)), purchase of construction materials or rolling stock, or project construction shall not proceed until the following have been completed:

(1)(i) The action has been classified as a categorical exclusion (CE), or

(ii) A FONSI has been approved, or

(iii) A final EIs has been approved and available for the prescribed period of time and a record of decision has been signed;

(2) For actions proposed for FHWA funding, the FHWA Division Administrator has received and accepted the certifications and any required public hearing transcripts required by 23 U.S.C. 128;

(3) For activities proposed for FHWA funding, the programming requirements of 23 CFR Part 450, Subpart B, and 23 CFR Park 630, Subpart A, have been met.

(b) For FHWA, the completion of the requirements set forth in paragraph (a)(1) and (a)(2) of this section is considered acceptance of the general project location and concepts described in the environmental document unless otherwise specified by the approving official. However, such approval does not commit the Administration to approve any future grant request of fund the preferred alternative.

(c) Letters of Intent issued under the authority of section 3(a)(4) of the UMT Act are used by UMTA to indicate an intention to obligate future funds for multi-year capital transit projects. Letters of Intent will not be issued by UMTA until the NEPA process is completed.

3. 42 U.S.C. § 4332(C) (1991)

§ 4322. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts [NEPA § 102]

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

A concise statement of the case

This is a suit to enforce the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (1991) and Federal Highway Administration (FHWA) regulations promulgated pursuant to NEPA. 23 C.F.R. § 771.113 (1991). The crux of the case on the merits is the authority of the judiciary to prevent non-federal actors from compromising the NEPA process prior to the time at which an Environmental Impact Statement (EIS) must be completed.

The Petitioners are local environmental and urban planning groups. One of the Respondents is the Texas Department of Transportation.[1] One is FHWA. The third is a landowner's corporation that is an agent for the state highway department. The dispute involves two large freeways, the Austin Outer Loop and MoPac South, that will traverse and intersect over a small and shallow drinking water aquifer on the southwest fringe of Austin, Texas. (A map of the relevant area is at App. 63.)

By the summer of 1989, NEPA environmental assessments had been prepared on the Loop and on MoPac South, FHWA (the federal Respondent) had published and not retracted a Federal Register Notice of Intent to prepare NEPA environmental impact statements covering the entire Loop, 7/8s of the Loop was in fact in the NEPA draft EIS process, various representations had been made to the public by the state and federal highway officials to the effect the Austin Outer Loop would be federally-financed and/or supervised, state highway officials had repeatedly made

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1 This Respondent is referred to in the district court opinion as "SDHPT" and in the appellate opinion, as "TDH." It is often referred to in this Petition as "the state."

similar representations to local governmental officials, and a substantial portion of the Loop was in Section 7 (i.e., federal project) Endangered Species Act[2] consultation.

Nonetheless, the state highway department and the landowners' corporation undertook to construct Segment 3 of the Austin Outer Loop (the aquifer-crossing segment) and MoPac South without federal funding and without preparing NEPA environmental impact statements that covered them.[3] Petitioners sued to halt some of the ongoing MoPac South construction and to prevent the start of Segment 3 construction. District court jurisdiction was invoked pursuant to 28 U.S.C. § 1331(a) (1991).

Judge Walter S. Smith, Jr., was the trial judge. The case was pending before him somewhat more than nine months, and was the object of a day's preliminary injunction hearing and of several extensive partial summary judgment motions. The record, exclusive of testimony transcriptions and trial exhibits, was approximately 2500 pages at the time of judgment.

Judge Smith, sitting without a jury in Waco,[4] took three days' testimony and thousands of pages of documentary

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2 16 U.S.C. § 1536 (1991).

3 They did prepare state "EIS"s on MoPac South and, ultimately, on Segment 3. Texas at the time had no statutory or regulatory law providing for environmental review of state projects. The Petitioners alleged the inconspicuous switch to *ad hoc* state procedures was deceptive conduct, while the state and private Respondents (at least) alleged the invoking of state environmental review procedures should have alerted Petitioners to sue sooner, if they were going to sue at all.

4 Waco is 100 miles north of Austin.

evidence at the trial on the merits. In March 1990, he ruled, in the main, for Petitioners. Specifically, he found:

> [T]he Court is of the opinion that the Austin Outer Loop is a 'proposal for major federal action' subject of an environmental document, and further that Segment 3 cannot be 'segmented' from the overall proposal and funded separately before the environmental process pursuant to NEPA on the entire loop is completed.

App. 50. He further found MoPac South was subject to NEPA, because the southern half of MoPac South had been developed simultaneously with Segment 3 of the Austin Outer Loop, and because MoPac South was an extension of a federal project, was a connector of three federal projects and lacked substantial independent utility. App. 51 and 67. He issued an injunction prohibiting further project development activities on Segment 3 and on a portion of Mopac South pending completion of the NEPA process on the Loop and a portion of MoPac South. App. 61 - 62 . He did not order an EIS be prepared on roadway.

The principal legal bases for Judge Smith's opinion were Hawthorn Environmental Preservation Assoc. v. Coleman, 417 F.Supp. 1091 (N.D. Ga. 1976), aff'd *per curiam*, 551 F.2d 1055, 1056 (5th Cir.1977) (high likelihood of future federal funding justifies NEPA application to highway project even in the absence of a pending federal funding request) and the Federal Highway Administration's

interpretation of its NEPA regulations.[5]

The Respondents appealed to the Fifth Circuit. Then-Chief Judge Clark and Judges Barksdale and Williams reversed and rendered for Respondents in a lengthy per curiam opinion. App. 1 - 33. The appellate court made numerous fact findings, about which Petitioners complain, *infra.* It found the Austin Outer Loop is only "contemplated," rather than "proposed," and is not, in any event, "federal" [App. 18]; it found neither Segment 3 nor any portion of MoPac South is an integral part of the Loop [App. 20]; and it found Segment 3 and MoPac South have independent utility and other characteristics related to segmentation analyses. [App. 29 - 30].

The legal doctrine guiding the appellate court's distinction between "proposed" and "contemplated" actions was not explicitly stated, and the examples of basic facts (see, note 11) the appellate court found to foreclose "proposal" status for the Loop [App. 18] are of the sort common to most large projects. On the "federal" action issue, however, it is pretty clear the appellate court did not believe prospective federal control of a project, however thoroughly established,

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[5] The entire interpretation of the most relevant regulation, 23 C.F.R. § 771.113, is reproduced at App. 71-77. It provides, in small part (emphasis added):

> It is important to note that the limitations on premature commitments in the CEQ regulations and this regulation apply to projects or activities that may be proposed entirely for local funding by an applicant or prospective applicant . If the action in question is an integral part of a larger project which is the subject of an environmental document, that action cannot be "segmented" from the overall proposal and funded separately before the environmental process is completed.

can support the application of NEPA constraints to privately-funded activities.

The appellate court cited numerous cases, but the most frequently-cited ones were Macht v. Skinner, 916 F.2d 13 (D.C.Cir. 1990) (federal funding of preliminary design and environmental studies does not trigger NEPA application) and Village of Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477 (10th Cir. 1990), *cert.* denied, --- U.S. ----, 111 S.Ct. 1017, 112 L.Ed.2d 1099 (1991) (retaining eligibility for federal funding does not alone make a project "major federal action"). The appellate court did not address the FHWA regulation or the agency interpretation of it on which the district court had relied.

Because, in Petitioners' view, the appellate court overturned trial court fact findings in violation of Rule 52, Fed. R. Civ. Proc., and in violation of applicable Supreme Court precedent on appellate fact-finding (cited *infra*), and because the opinion would largely eviscerate NEPA for any sizeable project, Petitioners suggested an *en banc* rehearing, which was denied both as a request for panel rehearing and for *en banc* rehearing. App. 70. Petitioners' request that the appellate court stay its mandate pending this Court's decision on their *certiorari* petition was denied March 19, 1992.

Argument amplifying the reasons for allowance of the writ

The principal reasons the Court should grant *certiorari* are that the Fifth Circuit in this cause both usurped the fact-finding role our system rightly assigns to the trial court and it failed to exercise the primary responsibility of appellate courts: the enunciation or clarification of legal doctrine. The appellate court set aside -- without explaining

an appellate review standard by which it was doing so -- numerous district court fact findings that were not clearly erroneous. For one of its critical fact-findings (that the Austin Outer Loop is "contemplated," rather than "proposed"), it did not offer explicitly a rule of general applicability to guide future fact finders, and the basic facts it marshalled to support its finding imply a rule so unworkable as to invite disregard by future fact-finders.

Furthermore, *certiorari* review is justified because (1) the Fifth Circuit's "not a proposal" finding stretches one of this Court's NEPA cases [Kleppe v. Sierra Club, 427 U.S. 390, 96 S.Ct. 2718 (1976)] to cover an extreme not intended by this Court, and because (2) a dispassionate reading of the appellate opinion compels the conclusion prospective federal control of a project is not relevant to protection (through restraint of state actors) of the impending or, even, on-going NEPA process. This latter position is not logical, and it cuts across the grain of CEQ and FHWA regulations and of a substantial body of NEPA caselaw.

The appellate function and respect for the clearly erroneous standard for appellate review of fact findings:

The Petitioners' criticism of the Fifth Circuit's extensive finding of facts and their criticism of its not enunciating doctrine go to the core of what is generally conceded to be the principal legitimate appellate function.

Judge Posner, of the Seventh Circuit, has in recent years been particularly assertive on the matter of the proper appellate function. In Mucha B. King, 792 F.2d 602, 605-606 (7th Cir. 1986), he strongly suggested the only legitimate appellate responsibility is the maintenance of uniformity and coherence in the law, and that, being the case, that rigid adherence to the Rule 52(a) "clearly erroneous" review

standard is essential to the proper exercise of appellate authority. Petitioners are not prepared to embrace wholeheartedly the absolute character of the position attributed to Judge Posner, but it would not seem open to legitimate dispute that maintenance of doctrinal uniformity is the primary appellate court responsibility.[6]

To the extent appellate review permits the finding anew of facts, appeals are encouraged, with the concomitant increase in costs to litigants and in burden on the appellate system and, probably, with the collateral effect of exacerbating public dissatisfaction with the slow pace of resolving disputes through the court system. Justice White, speaking for this court in Anderson v. City of Bessemer City, recently expressed most of this sentiment:

> "Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the court has

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[6] The following summary of the reasons why maintenance of doctrinal uniformity is the primary or, even, sole justification for exercise of appellate authority has been largely articulately (recently) by Professor Evan Tseng Lee in *Principled Decisionmaking and the Proper Role of Federal Appellate Courts: the Mixed Questions Conflict*, 64 So. Cal. L. Rev. 235, 247-256 (1991) and (earlier) by Professor Charles Wright in *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L.Rev. 751 (1957).

> stated in a different context, the trial on the merits should be the 'main event' ... rather than a 'tryout on the road.'"

Anderson v. City of Bessemer City, 740 U.S. 564, 574-575, 105 S.Ct. 1504, 1512 (1985).

Petitioners are particularly sensitive to the Bessemer City passage about the burdens on parties of having to try the facts of their cases more than once. All parties to the case at bar compiled and put to Judge Smith reams of evidence laying out the basic facts. They did this "live" at the preliminary injunction hearing and, later, through various extensive partial summary judgment motions and, later still, "live" in three days of trial (a 100 miles from home) and in post-trial written arguments. Through these efforts, the parties acquainted Judge Smith with the basic facts and with their nuances. An understanding of the latter is essential to the accurate drawing of inferences to find ultimate facts, and the understanding is exceedingly hard to re-convey at the appellate level in 50 pages and 20 minutes per side.[7]

The Bessemer City concern about the diversion of judicial (appellate) resources is also particularly *apropos* to this case, in Petitioners' view. Expenditure of appellate effort on fact finding necessarily means there are fewer appellate resources for maintenance of doctrinal uniformity. Clarity and reasoning regarding generally applicable principles can not receive the attention they would, were appellate resources

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[7] Respondents will doubtless argue here, as they did in the court of appeals, that everything of moment was stipulated in this case via an un-accepted pretrial order. [See, footnote 3 to the opinion of the court of appeals, App. 4.] The stipulations are precisely worded and address only the most basic facts. The parties did not agree on many of the more inferential facts the stipulated facts might or might not support.

not also committed to finding facts.

The appellate opinion in this case is particularly lacking in clearly expressed or explained principles of general application. The heart of the opinion, its "major federal action" section [App. 9 - 21], must almost be outlined, if one is to keep straight findings and discussion germane the entire Loop, on the one hand, or only to Segment 3 of the Loop or to MoPac South, on the other hand; this section's segues between the "federal action" issue and the "proposal" issue and back to the "federal action" issue likewise do not contribute to clarity.

A point not mentioned in the Bessemer City opinion, but also supportive of strict adherence to the Rule 52(a) mandate, is that appellate court fact finding tends to undermine the legitimacy of governmental power. It loosens a perceived constraint on governmental (i.e., judicial) power[8], and it weakens the focus of today's appellate courts on their responsibilities to enunciate generally applicable principles that will in reality operate to constrain (i.e., be taken as precedent by) and, thus, help legitimize the power of future courts.

The finding the Loop is not yet "proposed":

Though the appellate court opinion itself frequently lapses into describing the Austin Outer Loop as "proposed,"[9] it clearly finds the Loop is, "in essence," only contemplated and conceptual [App. 18] and nonexistent except in

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8 Please see the Lee article (*Principled Decisionmaking . . .*), *supra*, particularly at 255, for discussion of the importance of constraints as means to legitimize governmental power.

9 See, for example, App. 2 (twice), App. 7, and App. 8.

"speculative plans for years ahead." App. 20 - 21. The district court had found otherwise. App. 50. The district court opinion noted the state had for the last three years been including the Loop in its submissions for the Austin area's Transportation Improvement Program[10] [App. 44], it noted the FHWA's characterization of the Loop as "proposed" in its Federal Register Notice of Intent[11] [App. 42], and it noted the FHWA's characterization of the Loop as "proposed" in a letter to the Audubon Society [App. 43].[12]

The appellate opinion does not explain why reliance on these basic facts to support a "proposal" finding would be clearly erroneous in the context of this case. Worse yet, the appellate opinion, at footnote 9, cited only a portion (without ellipses) of the "proposal" definition promulgated by the CEQ. The omitted portion of the CEQ definition is certainly germane on its face to cases of the type before the court (i.e., germane to cases where the agency disputes the existence of a

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10 This statement of transportation projects planned for implementation in the next at least three years and next two years is required by 23 C.F.R. § 450 (particularly, Subpart B) as part of the federal-aid transportation planning process; the district court had before it Plaintiffs' trial exhibits P-58 through P-60, which showed the Austin Outer Loop in the annual elements of those programs and scheduled for federal funding.

11 A Notice of Intent is required by CEQ regulation to describe the "proposed action" and alternatives. 40 C.F.R § 1508.22.

12 The district court opinion is supported by other evidence (e.g., the at least $4.25 million the state had spent on Loop engineering studies) before Judge Smith, but not explicitly acknowledged in the opinion. The "proposal" dispute, such as it was, at trial was as to whether there was one proposal (the Loop) or five proposals (segments as independent projects). App. 49.

proposal): "a proposal may exist in fact as well as by agency declaration that one exists." 40 C.F.R. § 1508.23. The appellate opinion did not explain why this portion of the definition is suspect or how the district court erred in applying this definition.[13]

The appellate opinion makes fact findings on which it apparently bases its decision the Loop is not yet "proposed." App. 18. Most of these are not to be found in the district court opinion, and they are all exceedingly generic.[14] In any event, the making of these findings is in direct conflict with this Court's teaching just six years ago in Icicle Seafoods v. Worthington, 475 U.S. 709, 714, 106 S.Ct. 1527, 1530 (1986), and ten years ago in Pullman-Standard v. Swint, 456 U.S. 273, 291-293, 102 S.Ct. 1781, 1791-1792 (1982) (where appellate court believes the district court misapprehends how an ultimate fact is defined at law, the appellate court should remand for relevant fact-findings).

The low likelihood the appellate court's guidance will constrain future jurists regarding when the "proposal" stage is at reached:

Petitioners earlier noted maintenance of doctrinal

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[13] The appellate opinion does state, "the District court incorrectly elevated FHWA's early coordination process to the status of a 'proposal' under NEPA." App. 15. Putting aside any disagreement about the accuracy of this statement, it is still not helpful to future jurists in the absence of elaboration on how a process might be a "proposal."

[14] For example, "major construction projects, like the Austin Outer Loop, customarily change in design, cost, scope, and impact over the years required for development."

uniformity is the dominant, some say the only, reason for appellate review. The appellate opinion in this case does not lay out principles conscientious future jurists will find credible for drawing the "contemplated" versus "proposed" distinction, and, therefore, fails to meet the standard on which this Court should insist.

The court of appeals's findings in support of its "contemplated action" inference are the only source (by implication) of a potential rule of general applicability. The rule to be drawn from the assumed relevance of the findings stated sweeps so broadly that it realistically will not be accorded precedential effect by future jurists, unless NEPA is to become "dead letter" law for most large projects. If it were honored as the doctrine by which projects may be excluded from NEPA coverage, complicated projects, projects to be built in phases and, indeed, projects for which some phases are not absolutely certain of construction would not be subject to NEPA. In most circumstances, the CEQ and FHWA regulations regarding the premature commitment of resources to projects would be meaningless,[15] and regulations providing for supplemental EISs, which are intended to accommodate the possibility of changed future conditions, would be rendered largely unnecessary.

The Fifth Circuit's unwarranted extension of Kleppe:

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15 Were the appellate opinion's implicit doctrine honored, consider the general lack of need for, for example, proscriptions against advance right-of-way purchase. The highway or transit project for which the purchase is intended might change in scope or design or financing or construction timing, etc., in the future, so it would not qualify (under the appellate court's implicit doctrine) as "proposed" for purposes of NEPA. Cf., National Wildlife Federation v. Snow, 561 F.2d 227 (D.C. Cir. 1976) and 23 C.F.R. § 771.113(a).

The appellate court's use of the terminology of Kleppe v. Sierra Club, 427 U.S. 390, 96 S.Ct. 2718 (1976), lends stature to the appellate opinion, but it erodes the stature of Kleppe, because the opinion extends the Kleppe principle to an unreasonable reach.

Kleppe dealt with a demand by plaintiffs for preparation of a regional EIS covering federal permitting for numerous coal development activities in an area encompassing portions of four states. In Kleppe, the trial court "found no evidence that the individual coal development projects undertaken or proposed by private industry and public utilities in that part of the country are integrated into a plan or otherwise interrelated." Kleppe, *supra*, at 427 U.S. 401, 96 S.Ct. 2726.

In the case at bar, the district court did not order an EIS (regional or otherwise) be prepared, so there is lacking in this case the rationale for the straight-forward statutory interpretation analysis this Court made in Kleppe. The "region" of the Austin Outer Loop is basically one county.[16] Most importantly, it was the fact finding by the jurist on the scene with the most exposure to the facts that the Loop is an integrated plan. Judge Smith found: "The Defendants have maintained throughout this litigation that the Austin Outer Loop was not conceived as one project nor were the segments being proposed, planned, designed, or constructed as one project. However, the evidence does not support this contention." App. 17. This is exactly opposite the trial court finding in Kleppe.

The appellate court's invocation of the Kleppe rubric in this case, which is factually so unlike Kleppe, confuses doctrine, rather than clarifies it, and should not be permitted.

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16 About three miles of the Loop dips into a second county.

The question of whether the Loop is "federal":

The appellate opinion finds the Austin Outer Loop is not "federal" for NEPA purposes, even if it were conceded the Loop is a proposal. App. 9 - 21; most directly at 21. The district court found otherwise. App. 49 - 50.

Again, Petitioners fault the appellate court for setting aside a trial court (inferential) fact finding that was not clearly erroneous and for not offering a clear explanation of principle by which future jurists might know why the basic facts the trial court found can not support the trial court's determination of ultimate fact. Again, Petitioners urge that these failures in the appellate review process merit correction by this Court.

The district court found the state's position to be that the Loop would be federally funded wherever possible [App. 41 - 42], it found the state anticipated adding the Loop to the federal-aid secondary system (of roadways) [App. 42], it found the FHWA's position before the public at large to be federal funds would be used to finance construction of each segment of the Loop [App. 42-43], it found the state in fact anticipated federal funding for the Loop and was so representing to elected local officials [App. 49 and 44], it found the FHWA was representing to interested members of the public it (FHWA) was the lead federal agency for EIS preparation and Endangered Species Act compliance on the Loop [App. 43, note 10], it found Section 7 (federal project) Endangered Species Act consultations were in fact ongoing on the western segment of the Loop [App. 18], it found the FHWA characterized the state as its "consultant" for preparing Loop EISs [App. 54], and it may reasonably be inferred to have found the FHWA was controlling decisions

about how the Loop was segmented [App. 43].[17]

The appellate opinion does not explain why (i.e., by what principle it is) these facts can not support a "federal" fact finding by a trial court.

The appellate court may be enunciating a legal principle that no project may be subject to NEPA restrictions, unless it is currently subject to federal control.[18] The opinion characterizes the "dispositive issue" of the case to be "whether at this juncture sufficient federal involvement exists in the Austin Outer Loop Project to constitute 'major Federal action' affecting the environment under NEPA." App. 9 - 10, emphasis added.

Petitioners equivocate about whether the appellate court's framing of the dispositive issue is exactly how the court actually saw the case, because the several-page discussion that follows the quoted statement focuses on preconditions to forcing preparation of an EIS, but the district court had not ordered an EIS be prepared. Also, the appellate opinion says [App. 11] the district court placed undue reliance on the prospective control aspect of the CEQ's "major federal action" definition, but the opinion does not say historical federal control is a *sine qua non* to the invocation of NEPA restraints on non-federal actors.

If the appellate court is in this case announcing a rule of general applicability that decrees non-federal actors may be restrained from compromising the NEPA process on

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17 The record also reflects other evidence, particularly other representations, not recited in the district court opinion but that support the district court's "federal" determination.

18 Even if this is the appellate court's position, the facts of Section 7 Endangered Species Act consultations and FHWA control of segmentation decisions should still be addressed.

transportation projects only after significant federal control has been exercised *vis-a-vis* the project, then this Court should intervene to prevent the establishment of such an unsound precedent.

As the district court noted [App. 46 - 47], the Federal Highway Administration's own interpretation of its NEPA regulations explicitly endorses the legal theory of Petitioners' case. (Please see note 5, *supra*.) Furthermore, were the fact of significant historical federal control a requisite to preventing non-federal actors from compromising the up-coming or ongoing NEPA process, then clever timing of requests to FHWA for construction approval would allow the routine circumvention of NEPA on federal-aid highway projects.[19] This would turn the concept of federal supremacy on its head.

Appellate fact findings related to the segmentation tests

The appellate opinion concludes with a lengthy discussion regarding proscriptions that may block preproposal segmentation. App. 21 - 32. Even as it writes, the court expresses doubt about whether there are or should be, at least as a consequence of NEPA, proscriptions on segmentation of a contemplated project before it reaches the "proposal" stage.

Petitoners worry those doubts are well-founded. In Petitioners' view, the appellate opinion already excludes from the "proposal" umbrella a plethora of factual situations this Court's Kleppe opinion never intended to exclude. To next suggest in *dicta* the extension of NEPA protection to some

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19 All federal-aid highway projects, as the appellate court correctly notes [App. 9, note 6], are actually state projects that receive federal financial assistance. 23 U.S.C. § 145 (1991).

particularly-characterized subsets of those excluded situations seems unwise; it seems like an unnecessary invitation to the growth of Byzantine legal doctrine.

That said, Petitioners simply want here to bring to this Court's attention the circumstance that this final discussion in the appellate opinion is heavy with fact findings either not in the district court opinion or contrary to those in the district court opinion. For example, the appellate court finds: "appellees have offered no evidence that any segment of the Austin Outer Loop is dependent on any other segment for its utility." App. 27. Well, among the examples of evidence appellees in fact offered was the following testimony of their transportation planning expert[20]:

> Question: Now, . . . we have discussed a bit . . . how the rest of the Loop . . . affects Segment 3. If Segment 3 were taken out of the Loop . . . would the purpose of SH-45 continue to be served?
>
> Answer: The -- no, it wouldn't, not as stated. [The Loop would no longer serve its regional traffic by-pass function.]

Rec. Vol. 16, p. 251.

Similarly, the appellate court found: "MoPac South has utility independent from the Austin Outer Loop as well as Segment 3, and . . .." App. 29. Judge Smith, of course, had found otherwise. App. 67. Petitioners' transportation planning expert had testified MoPac South would not be able

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[20] S.H. 45, referred to in the quotation, is the official designation for the Austin Outer Loop.

to serve its regional transportation function, were it disconnected from Segment 3, and, therefore, without the connection, MoPac South would be an unreasonably large facility. Rec. Vol. 16, p. 253.

These examples demonstrate both the ease with which those who did not hear the evidence can mis-apprehend what the evidence is and how they can mis-infer what the evidence shows. They are examples, if more be needed, of the wisdom of leaving factual determinations in the hands of the trial court judge to the maximum extent possible.

A *caveat* regarding two potential arguments against discretionary review

Certiorari review, of course, is discretionary review, so practical considerations may weigh particularly heavily in the decision to grant or deny review. That being so, the next paragraphs quickly address two arguments Petitioners suspect will be raised in opposition to discretionary review.

The first is one that seems to have preoccupied the appellate court. It is the argument that states would have to forego the benefits of early coordination with FHWA in order to retain the option to build "state" projects not subject to NEPA, if the district court decision were upheld. This worry is simply not well-founded. What happened in the case at bar is that FHWA and state highway officials in their pre-litigation writings accurately described the Austin Outer Loop as a proposed federal project. These descriptions became evidence on which the trial court relied. Admittedly, the officials often made the descriptions in the texts of documents related to early coordination on the project. It is not, however, as though the fact of coordination forced them to write things that were not true.

The "problem" is easily avoided if state highway

officials and FHWA in writings related to their early coordination on projects are simply explicit about what they are doing; they need to say, for example, "An environmental impact statement will be prepared on this project, because the state wishes to retain the possibility to pursue federal funding for some or all of the project."

This Court may also be told it would be a waste of resources to deliberate at length on this *certiorari* petition, because the relevant issues were considered and *certiorari* review denied just a year ago in Village of Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477 (10th Cir. 1990), *cert.* denied, --- U.S. ----, 111 S.Ct. 1017, 112 L.Ed.2d 1099 (1991). In fact, the issues of that case and the case at bar are not the same or, even, particularly similar.

Most importantly, Village of Los Ranchos did not raise the core issues raised here by Petitioners. It did not purport to address the impropriety of casual appellate fact finding. It did not address the "proposed/contemplated" issue; Kleppe is not even cited. It did not address whether prospective federal control, if found by the trial court, is germane to enjoining premature non-federal activity.

Village of Los Ranchos involved a two-bridge project over the Rio Grande, a project for which a former mayor and two highway officials testified "federal funding has not been and will not be requested . . .." (at 1479, emphasis added.) The question of the federal or state character of the Austin Outer Loop is not analogous to the question of the federal or state character of the two bridges, because in the case at bar there is absolutely no evidence federal funds will be foregone on the $800 million (or so) loop project [see, App. 49], and FHWA actually stated in its Notice of Intent that federal funds would be used in all segments of the Loop. App. 43.

Village of Los Ranchos also involved the issue of

segmentation of one of the bridges from a federal highway project, but the trial court there found, "[Plaintiffs have] presented no evidence to the Court that the [I-25] project is in any way related to the Montano bridge crossing, ..." (at note 5). The trial court finding in the case at bar, of course, was just the opposite: Segment 3, as its name denotes, is indeed a segment of the Austin Outer Loop. App. 50.

Prayer

In light of the foregoing demonstration of appellate court error that undermines both the tenets of judicial review, *per se*, and the vitality of our nations' cornerstone environmental law, Petitioners pray this Court issue the writ of *certiorari* to the Fifth Circuit Court of Appeals and suspend the mandate of that court. Petitioners frankly believe this Court may appropriately enter a summary disposition of this cause on the merits; a concise and an informative summary disposition might read, "The judgment of the court of appeals in this cause is reversed and the district court opinion, as amended, is ordered published. Anderson v. City of Bessemer City, 740 U.S. 564, 573, 105 S.Ct. 1504, 1511 (1985) and Hawthorn Environmental Preservation Assoc. v. Coleman, 417 F.Supp. 1091 (N.D.Ga. 1976), aff'd *per curiam*, 551 F.2d 1055 (5th Cir.1977)."